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No. 10-433

In the Supreme Court of the United States

ROTHE DEVELOPMENT CORPORATION, PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in declining to award attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), based on a finding that the government's ultimately unsuccessful position in this case was "substantially justified."

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3-5) is not published in the *Federal Reporter* but is reprinted in 374 Fed. Appx. 36. The opinion of the district court (Pet. App. 6-22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2010. A petition for rehearing was denied on July 20, 2010 (Pet. App. 1-2). The petition for a writ of certiorari was filed on September 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, Congress enacted the National Defense Authorization Act for Fiscal Year 1987 (1987 Act), Pub. L. No. 99-661, 100 Stat. 3816. Section 1207 of that Act

established a goal that five percent of the procurement contracting undertaken by the Department of Defense (DoD) in fiscal years 1987-1989 would be entered into with small business concerns owned and controlled by socially and economically disadvantaged individuals (SDBs), as defined in Section 8(d) of the Small Business Act, 15 U.S.C. 637(d). 1987 Act § 1207, 100 Stat. 3973 (10 U.S.C. 2323). Section 8(d) of the Small Business Act provides that "[t]he term 'small business concern owned and controlled by socially and economically disadvantaged individuals' shall mean a small business concern" that is majority-owned by "one or more socially and economically disadvantaged individuals" and "whose management and daily business operations are controlled by one or more of such individuals." 15 U.S.C. 637(d)(3)(C)(i) and (ii). Section 8(d) also provides that "socially and economically disadvantaged individuals" shall be presumed to include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. 637(d)(3)(C).

Section 1207(e)(3) of the 1987 Act also directed DoD to take certain measures to achieve the five percent SDB goal, including "enter[ing] into contracts using less than full and open competitive procedures" and paying to SDBs "a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors." 100 Stat. 3974. DoD implemented that directive by applying a price-evaluation adjustment (PEA) to bids submitted by non-SDB bidders. Applying the PEA had the effect of increasing non-SDB bids by ten percent before comparing them to bids submitted by

SDBs. *Rothe Dev. Corp.* v. *DoD*, 49 F. Supp. 2d 937, 941 (W.D. Tex. 1999) (*Rothe I*).

In 1989, Congress reauthorized Section 1207 for three years. See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §831(b), 103 Stat. 1507. In 1992, Congress reauthorized Section 1207 for an additional seven years. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 801(a)(1)(B), 106 Stat. 2442. In 1998, Congress amended Section 1207 by requiring DoD to suspend the use of the PEA mechanism for one year after any year in which DoD awards more than five percent of its eligible contract dollars to SDBs. See *Rothe Dev. Corp.* v. *DoD*, 262 F.3d 1306, 1314 (Fed. Cir. 2001) (*Rothe III*). Because DoD met the five percent goal in 1998, it suspended use of the PEA for 1999. See *Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses*, 64 Fed. Reg. 4847 (1999). Congress again reauthorized Section 1207 in 1999, see National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 808, 113 Stat. 705, and in 2002, see Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 816, 116 Stat. 2610. In every fiscal year from 1998 through 2007, DoD determined that it had met the five percent goal; DoD accordingly suspended use of the PEA from 1999 to 2009. See Pet. App. 36; *Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses*, 73 Fed. Reg. 9304 (2008).

During the debate that preceded the 2006 reauthorization of Section 1207, Senator Kennedy spoke on the Senate floor in support of the program's extension. Senator Kennedy stated that problems stemming from discrimination in contracting "affect a wide variety of areas

in which the Department offers contracts, and the problems are detailed in many recent disparity studies." 151 Cong. Rec. 25,753 (2005) (citing Mason Tillman Assocs., *City of Dallas Availability and Disparity Study* (2002); Griffin & Strong, P.C., *City of Cincinnati Disparity Study* (2002); Mason Tillman Assocs., *Ohio Multi-Jurisdictional Disparity Studies* (2003); MGT of America, Inc., *Procurement Disparity Study of the Commonwealth of Virginia* (2004); Mason Tillman Assocs., *Alameda County Availability Study* (2004); Mason Tillman Assocs., *City of New York Disparity Study* (2005)). Senator Kennedy also cited a 1996 report from the Urban Institute, which analyzed 39 state and local disparity studies. 151 Cong. Rec. at 30,658; see 61 Fed. Reg. 26,061-26,062 (1996).

Congress ultimately reenacted Section 1207, with amendments, in 2006. Congress further tailored the program so that, during years in which DoD does use the PEA, the size of the adjustment made to non-SDB bids may be smaller than ten percent if non-SDBs are being denied a reasonable opportunity to compete. 10 U.S.C. 2323(e)(3)(A); Pet. App. 36 37. The amendments also directed that agencies "ensure that no particular industry category bears a disproportionate share of the contracts awarded to attain the [five percent SDB] goal," 10 U.S.C. 2323(g)(1)(A), and that agencies "take appropriate actions to limit the contracting activity's use of set asides in awarding contracts in that particular industry category," 10 U.S.C. 2323(g)(2). Pet. App. 37.

2. a. Petitioner was denied a 1998 contract with DoD to operate and maintain the Network Control Center and the Switchboard Operations functions at Columbus Air Force Base in Mississippi. *Rothe I*, 49 F. Supp. 2d at 941. The contract at issue was subject to Section

1207, 10 U.S.C. 2323, as reauthorized in 1992. Petitioner was the low bidder for the contract, and it is undisputed that petitioner's bid was rejected due to application of the PEA, which resulted in the award of the contract to an SDB owned by a Korean-American individual. *Rothe I*, 49 F. Supp. 2d at 941. Petitioner filed suit in federal district court, challenging the facial constitutionality of Section 1207 and the constitutionality of the program as applied to petitioner. Pet. App. 31.

The district court granted summary judgment in favor of DoD. The court determined "that there is sufficient evidence to support remedial action in the form of SBA preferences and the 1207 program and that these programs were designed to address a compelling government interest." *Rothe I*, 49 F. Supp. 2d at 946; see *id.* at 945-949. The court also concluded that the program was narrowly tailored to serve the government's compelling interest. *Id.* at 949-953. On appeal, the case was transferred from the Fifth Circuit to the Federal Circuit based on petitioner's claim under the Little Tucker Act. *Rothe Dev. Corp.* v. *DoD*, 194 F.3d 622 (5th Cir. 1999) (*Rothe II*).

b. The Federal Circuit reversed, holding that the district court had not identified sufficient evidence that was before Congress at the time of the 1992 reauthorization of Section 1207 to justify the determination "that there was a compelling interest for reauthorization of the [Section] 1207 program." *Rothe III*, 262 F.3d at 1324. The court of appeals remanded for a determination of "the constitutionality of [Section] 1207" under a less deferential analysis than that used by the district court. *Id.* at 1332.

c. In 2002, before the district court issued a new decision on remand, Congress reauthorized Section 1207.

In 2004, the district court granted DoD's motion to dismiss petitioner's Little Tucker Act claim as moot, leaving only petitioner's request for declaratory relief as to the 1998 application of Section 1207 to it and petitioner's facial challenge to the Section 1207 program. *Rothe Dev. Corp.* v. *DoD*, 324 F. Supp. 2d 840, 845 (W.D. Tex. 2004) (*Rothe IV*). The district court concluded that the 1992 reauthorization of Section 1207 (under which the contract at issue was awarded) was unconstitutional because Congress had failed to properly consider statistical evidence of racial discrimination in contracting. *Id.* at 845-854.

Turning to petitioner's facial challenge to the 2002 reauthorization of Section 1207, the district court found that the statistical evidence of racial disparities before Congress provided the strong basis in evidence necessary to establish a compelling government interest for use of racial criteria in the program. *Rothe IV*, 324 F. Supp. 2d at 854-855. The court also held that, by documenting a history of discrimination that had impeded the ability of minority-owned firms to compete for federal contracts, Congress had established a strong basis in evidence to justify reauthorization of the Section 1207 program. *Id.* at 854-860. The district court therefore denied petitioner's claims for declaratory and injunctive relief regarding the 2002 reauthorization. *Id.* at 860.

Although the district court ordered that each party would cover its own attorney's fees and expenses because DoD was "substantially justified" in defending Section 1207, *Rothe IV*, 324 F. Supp. 2d at 860, petitioner filed an application for attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A). The district court denied that application, stating that DoD's "position in the litigation was essen-

tially to justify a duly and properly enacted federal statute against an attack on its constitutionality." *Rothe Dev. Corp.* v. *DoD*, No. Civ. A. SA-98-CA-1101, 2004 WL 1941290, at *2 (W.D. Tex. Aug. 31, 2004). The district court found that, although Section 1207 was found unconstitutional as reauthorized in 1992, DoD's "position was justified on the basis that a reasonable argument could be made in defense of the constitutionality of the statute [as of 2002,] * * * evidenced by the struggle that this [c]ourt, as well as the Federal Circuit, has gone through in order to come to some resolution in this case." *Id.* at *3.[1]

d. Petitioner appealed. The court of appeals vacated the district court's decision and remanded the case to allow the parties to develop the evidentiary record regarding the 2002 reauthorization of Section 1207. *Rothe Dev. Corp.* v. *DoD*, 413 F.3d 1327, 1330-1339 (Fed. Cir. 2005) (*Rothe V*). The court of appeals held—and both parties agreed—that the district court had erred in focusing on whether there was sufficient evidence before Congress to justify the 1992 reauthorization rather than "evaluati[ng] the present reauthorization of section 1207." *Id.* at 1335-1337. In January 2006, while the case was before the district court on remand, Congress again reauthorized Section 1207. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 842, 119 Stat. 3389.

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[1] The district court further held that petitioner was not a prevailing party under EAJA because petitioner's only relief was the "'moral satisfaction' of knowing the statute at issue was, at the time applied to it, unconstitutional." 2004 WL 1941290, at *3. The court reasoned that "[t]he fact that the statute is now constitutional denies [petitioner] any prospective relief and essentially precludes it from claiming status [as] a prevailing party." *Ibid.*

e. On August 10, 2007, the district court entered a lengthy decision upholding the facial constitutionality of Section 1207 and granting DoD's motion for summary judgment. *Rothe Dev. Corp.* v. *DoD*, 499 F. Supp. 2d 775 (W.D. Tex.) (*Rothe VI*). Following the directive from the court of appeals, the district court noted that its task was to "consider 'all evidence available to Congress predating the most recent reauthorization of the statute at issue.'" *Id.* at 821 (quoting *Rothe III*, 262 F.3d at 1322 n.15). The court noted that, if the "2006 Reauthorization is constitutional under strict scrutiny, then [petitioner] cannot obtain injunctive relief relative to the prior reauthorizations." *Ibid.*

Before analyzing Section 1207, the district court rejected six of petitioner's legal arguments regarding the types of evidence the court could consider in applying strict scrutiny review. The district court found that all six arguments had "been rejected by" the Federal Circuit in this case and/or by other courts of appeals. *Rothe VI*, 499 F. Supp. 2d at 825-835 & nn.55-60. The court then applied strict scrutiny to the 2006 reauthorization of Section 1207 and found that the statute was supported by a "strong basis in the evidence" sufficient to establish a "compelling interest." *Id.* at 835-878. The court also concluded that the 2006 reauthorization of Section 1207, and the regulations that implement the program, are narrowly tailored. *Id.* at 878-883. Finally, the district court again concluded that petitioner was not entitled to attorney's fees, both because petitioner was not a prevailing party as to its claim challenging the facial constitutionality of the 2006 reauthorization, and because DoD was "substantially justified in defending this action." *Id.* at 883.

f. On petitioner's appeal, the court of appeals reversed the grant of summary judgment to DoD and held that Section 1207 was facially unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 26-87. The court held that the record before Congress "d[id] not provide a substantially probative and broad-based statistical foundation necessary for the 'strong basis in evidence' that must be the predicate for nationwide, race-conscious action." *Id.* at 63. The court denied petitioner's request for EAJA fees as premature. *Id.* at 85-86. DoD did not seek further review of the court of appeals' decision on the merits.

3. After entry of final judgment, petitioner again filed an application for attorney's fees under EAJA, 28 U.S.C. 2412(d)(1)(A), which authorizes the award of attorney's fees to a prevailing party in a suit brought by or against the United States unless the position of the United States "was substantially justified" or "other special circumstances make an award unjust." See Pet. App. 6-22. The district court denied the application, holding that DoD's defense of Section 1207's constitutionality was substantially justified. *Id.* at 9-21. The district court examined the arguments asserted by DoD at various stages of the case and determined that there was a "reasonable basis in law and fact" for DoD's continued defense of Section 1207. *Id.* at 9 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988)); *id.* at 9-21.

Specifically, the district court explained that the "procedural history of the case at bar and the DoD's string of successes throughout the litigation indicate that the DoD had a reasonable basis in law for its position." Pet. App. 9. The court noted that, "[a]t the commencement of this action, th[e district court] first

agreed with the DoD's position in *Rothe I*, granting summary judgment to the DoD and upholding the constitutionality of Section 1207 as enacted in 1992." *Id.* at 10. The district court went on to catalogue DoD's string of successes in the lengthy litigation, including: (1) the court of appeals' remand of the case in *Rothe III* in which the court of appeals "declined to upset the judgment in favor of the DoD"; (2) the district court's decision granting in part DoD's motion for summary judgment and holding that petitioner's Little Tucker Act claim and requests for injunctive relief were moot; (3) the district court's decision in *Rothe IV* holding that Section 1207 was unconstitutional as applied to petitioner in 1998, but facially constitutional; (4) the court of appeals' decision in *Rothe V*, in which the court remanded the case because there was an "insufficient record on which it could determine the facial constitutionality of Section 1207," but "at least suggested that the issue of facial constitutionality presented a close call"; (5) the district court's subsequent denial of petitioner's motion for a preliminary injunction prohibiting DoD's use of any race-based programs; and (6) the district court's decision in *Rothe VI*, following the 2006 reauthorization of Section 1207, granting DoD's motion for summary judgment and holding that the 2006 version of Section 1207 was facially constitutional. *Id.* at 11-13. The district court stated that, although its decision in *Rothe VI* "was eventually reversed, the string of successes the DoD achieved throughout multiple rounds of this litigation via rulings from multiple judges suggests there was at least a reasonable basis in law for the DoD's position." *Id.* at 13.

The district court also held that Congress's 2006 amendment and re-enactment of Section 1207 provided

an additional basis for concluding that DoD's defense of the program had a reasonable basis in law because the amendments further narrowly tailored the program. Pet. App. 13-17. As the court noted, the 2006 amendments made significant changes to Section 1207, including changes that "addressed concerns of over-inclusiveness, underinclusiveness, and inadequate narrow tailoring." *Id.* at 14. The court further noted that new regulations were promulgated to more closely "tailor" the program "for those who truly have suffered from the effects of prior discrimination." *Id.* at 14-15. In addition, the court found that Congress had made it easier for non-minority firms to acquire SDB status by "lowering their standard of proof from a clear and convincing standard to a preponderance of evidence standard when proving social disadvantage for SDB certification." *Id.* at 15-16. The new regulations also "eliminated the prior race-based presumption of economic disadvantage" and made the determination of SDB status more individualized. *Id.* at 15. Finally, the new regulations permitted "any interested party to challenge a SDB certification and allow[ed] the presumption of disability to be overcome with credible evidence, reflect[ing] Congress's effort to ensure that the SDB and PEA programs were only used by individuals truly affected by discrimination." *Id.* at 16. These 2006 changes to the Section 1207 program, the district court determined, provided "a reasonable basis in law for the DoD's position in proceeding with the litigation." *Id.* at 17.

The district court also found that DoD's position was grounded in a "reasonable basis in fact," based on evidence before Congress in 2006 of statistical disparities documenting the agency's concern about the existence of "discrimination in government contracting." Pet.

App. 18-20. The court relied on the court of appeals' observations in *Rothe VII* that, "[w]here the calculated disparity ratios are low enough, we do not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions," and that "a minority-owned firm's capacity and qualifications may themselves be affected by discrimination." *Id.* at 19 (quoting *Rothe Dev. Corp.* v. *DoD*, 545 F.3d 1023, 1045 (Fed. Cir. 2008) (*Rothe VII*)).

Finally, the district court rejected petitioner's contention that DoD's loss on the merits in *Rothe VII*, in and of itself, indicated that DoD's position lacked substantial justification. Pet. App. 21. The court held that the "mere fact that the DoD's position ultimately proved unsuccessful at a later stage in this litigation does not preclude substantial justification." *Ibid.* "The standard for summary judgment," the court reasoned, "does not equate with the standard for awarding attorney's fees under the EAJA." *Ibid.*

The court of appeals affirmed without opinion. Pet. App. 3-5.

ARGUMENT

The court of appeals correctly determined that the district court did not abuse its discretion by denying petitioner's request for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). That decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. By authorizing an award of attorney's fees to a prevailing party in an action brought by or against the United States, EAJA creates an exception to the

"American Rule" (see *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975)) that litigants bear their own costs. Fees under EAJA are unavailable, however, if "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). EAJA defines the term "position of the United States" to include "the position taken by the United States in the civil action." 28 U.S.C. 2412(d)(2)(D).

If a party seeking fees alleges that the government's position was not substantially justified, see 28 U.S.C. 2412(d)(1)(B), the government bears the burden of showing that it was. See *Scarborough* v. *Principi*, 541 U.S. 401, 414-415 (2004). A district court's grant or denial of a request for attorney's fees under EAJA is reviewed for abuse of discretion. *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). Because "EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity[, a]ny such waiver must be strictly construed in favor of the United States." *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991).

In *Pierce*, this Court held that a legal position is "substantially justified" under EAJA if it has a "reasonable basis both in law and fact." 487 U.S. at 565. The Court made clear that "a position can be justified even though it is not correct," and it explained that, for purposes of EAJA, a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Id.* at 566 n.2. Courts of appeals have uniformly applied the definition of "substantially justified" announced in *Pierce*. See, *e.g.*, *United States* v. *One Parcel of Real Prop.*, 960 F.2d 200, 208 (1st Cir. 1992); *Healey* v. *Leavitt*, 485 F.3d 63, 67 (2d Cir. 2007); *Wil-*

liams v. *Astrue*, 600 F.3d 299, 301-302 (3d Cir. 2009); *United States* v. *Cox*, 575 F.3d 352, 355 (4th Cir. 2009); *Davidson* v. *Veneman*, 317 F.3d 503, 506 (5th Cir. 2003); *Howard* v. *Barnhart*, 376 F.3d 551, 553-554 (6th Cir. 2004); *Kholyavskiy* v. *Holder*, 561 F.3d 689, 691 (7th Cir. 2009); *Bale Chevrolet Co.* v. *United States*, 620 F.3d 868, 872 (8th Cir. 2010); *Kenney* v. *United States*, 458 F.3d 1025, 1033 (9th Cir. 2006); *Koch* v. *Department of the Interior*, 47 F.3d 1015, 1021 (10th Cir.), cert. denied, 516 U.S. 915 (1995); *United States* v. *Douglas*, 55 F.3d 584, 588 (11th Cir. 1995); *Hill* v. *Gould*, 555 F.3d 1003, 1007-1008 (D.C. Cir. 2009); *White* v. *Nicholson*, 412 F.3d 1314, 1316 (Fed. Cir. 2005), cert. denied, 547 U.S. 1018 (2006).

Petitioner argues (Pet. 13-15) that, when the underlying merits issue is governed by a heightened standard of review (in this case, strict scrutiny), that heightened standard should be "incorporated" into the substantial-justification analysis under EAJA. Although the precise import of that contention is unclear, petitioner appears to contend that the government's litigating position can never be substantially justified if the government loses a case based on the court's application of heightened scrutiny. See Pet. 12 (arguing that "[u]nconstitutional racial discrimination can never be justified, much less substantially justified"). Petitioner identifies no EAJA case in which a court has adopted that rule, and nothing in this Court's decisions suggests that cases decided under heightened scrutiny are an exception to the general rule that "a position can be justified even though it is not correct." *Pierce*, 487 U.S. at 566 n.2.[2]

[2] To be sure, in determining whether "a reasonable person could think [the government's litigating position] correct," *Pierce*, 487 U.S. at 566 n.2, a court should be cognizant of the established legal rules governing the underlying dispute. A rationale that reasonable people could

This Court has squarely rejected an interpretation of "substantially justified" that would equate the EAJA determination with the underlying merits determination in a particular case. The Court recognized in *Pierce* that "the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." 487 U.S. at 569. The Court reiterated that view in *Scarborough*, explaining that "Congress did not * * * want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.'" 541 U.S. at 415 (quoting H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 10 (1980)). The Court in *Scarborough* noted that "Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses." *Ibid.*

The courts of appeals also uniformly recognize that the inquiry into whether the government's position was substantially justified under EAJA "may not be collapsed into [a court's] antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard.'" *Cooper* v. *United States R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); accord, *Luciano Pisoni Fabbrica*

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view as adequate to justify some forms of government action might be self-evidently insufficient to sustain a law that is subject to strict scrutiny. In that limited respect, petitioner is correct that the applicability of heightened scrutiny to the underlying claim is relevant to the substantial-justification inquiry. But the Federal Circuit's ultimate holding that Section 1207 failed strict scrutiny does not mean that the government was unjustified in defending the statute against constitutional challenge. That is especially so because, as the district court emphasized, the government received a series of favorable merits rulings during the course of the litigation—rulings that were entered under a heightened standard of review.

Accessori Instrumenti Musicali v. *United States*, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988); *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 554 (3d Cir. 2001); *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.), cert. denied, 506 U.S. 822 (1992); *Spawn* v. *Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir. 1993), cert. denied, 510 U.S. 1109 (1994); *Griffon* v. *HHS*, 832 F.2d 51, 52 (5th Cir. 1987); *Welter* v. *Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991). Petitioner identifies no decision suggesting that a different approach is appropriate in cases where Acts of Congress are invalidated under a heightened standard of review.

Congress adopted the "substantially justified" standard in order to "balance[] the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." *Dole* v. *Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991) (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980)); cf. *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1259 (9th Cir. 1986) (noting that "the defense of a congressional statute from constitutional challenge will usually be substantially justified"); *Grace* v. *Burger*, 763 F.2d 457, 458 n.5 (D.C. Cir.) (stating that "situations in which the government's defense of the constitutionality of a federal statute fails the 'substantially justified' test should be exceptional"), cert. denied, 474 U.S. 1026 (1985). Courts have not interpreted EAJA as routinely exposing the government to fee liability for defending the constitutionality of Congress's own enactments. See *id.* at 459 (affirming denial of attorney's fees under EAJA even after this Court had unanimously held that 40 U.S.C. 6135, which prohibited expressive displays on Supreme Court grounds, was unconstitutional as applied to indi-

viduals who carried signs, banners, or devices on public sidewalks surrounding the Supreme Court building); *Gonzales* v. *Free Speech Coalition*, 408 F.3d 613, 620 (9th Cir. 2005) (reversing grant of attorney's fees under EAJA after this Court held unconstitutional certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A *et seq.*). Cf. *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers) (granting partial stay of an injunction against enforcement of a federal statute on the ground that the challenged "Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court").

The presumption that the government is substantially justified when it defends the constitutionality of federal statutes rests in part on the President's constitutional obligation to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. The defense of Acts of Congress by Executive Branch litigators is one means by which that duty is discharged. The significance of that obligation is reflected in the statutory requirement that the Attorney General report to both Houses of Congress if he decides to refrain from defending the constitutionality of any federal statute or regulation. 28 U.S.C. 530D(a)(1)(B)(ii). When, as in this case, the government's litigating position is "substantially justified" as that term was construed in *Pierce*—*i.e.*, when "a reasonable person could think [the position] correct," 487 U.S. at 566 n.2—neither text, precedent, nor logic suggests that Congress would have wished EAJA fees to be available simply because the challenged statute is ultimately held invalid under a heightened standard of review.

2. Under the established meaning of the terms Congress used in EAJA, the court of appeals correctly determined that the district court had not abused its discretion in declining to award attorney's fees to petitioner. That fact-bound application of law to the circumstances of this case does not warrant further review.

a. Consistent with this Court's analysis in *Pierce*, the district court considered whether the government's position in defending the constitutionality of Section 1207 "had a reasonable basis [both] in law and fact." Pet. App. 9 (quoting *Pierce*, 487 U.S. at 565). Based in part on the "string of successes" DoD had enjoyed over the long procedural history of the case, the court concluded that DoD had a reasonable basis in law for its position. *Id.* at 10 (quoting *Pierce*, 487 U.S. at 569). This Court in *Pierce* confirmed that such "objective indicia" of the reasonableness of the government's position "can be relevant," and it specifically noted that "a string of losses can be indicative; and even more so a string of successes." 487 U.S. at 568-569.

As the district court noted, it was required to "view events as they occurred rather than with the benefit of hindsight." Pet. App. 10 (quoting *Morris Mech. Enters., Inc.* v. *United States*, 728 F.2d 497, 499 (Fed. Cir.), cert. denied, 469 U.S. 1033 (1984)). Those events included: (1) the district court's 1999 decision granting summary judgment to DoD and upholding the constitutionality of Section 1207; (2) the Federal Circuit's decision in the first appeal, which remanded the case for further proceedings but did not at that time disturb the finding in favor of DoD; (3) the district court's subsequent findings on remand in favor of DoD on petitioner's Little Tucker Act claim and on the facial constitutionality of Section 1207 as reauthorized in 2002; (4) the court of appeals'

decision in the second appeal again remanding the case for further proceedings rather than finding in favor of petitioner; and (5) the district court's decision upholding the facial validity of Section 1207 as reauthorized in 2006. Pet. App. 11-13. Although the district court's decision on the merits was reversed in the third appeal to the Federal Circuit, the fact that DoD's position did not ultimately prevail does not indicate that it was not substantially justified throughout the ten years during which it garnered a string of successes.[3]

b. Relying on this Court's decision in *Commissioner* v. *Jean*, 496 U.S. 154 (1990), petitioner argues (Pet. 34-36) that the district court was not permitted to consider the "string of successes" DoD enjoyed throughout the litigation because DoD's position ultimately did not prevail. Petitioner's reliance on *Jean* is misplaced. The Court in *Jean* held that "[t]he single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' * * * operates as a one-time threshold for fee eligibilty." 496 U.S. at 160. The Court explained that, "[w]hile the parties' postures on individual matters [throughout the litigation] may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162; accord, *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) ("[W]e look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reason-

[3] The district court also correctly noted that the changes Congress had made to the Section 1207 program during the course of this litigation provided an additional reasonable basis in law for DoD's position. See pp. 10-11, *supra*; Pet. App. 13-16.

ably in causing the litigation or in taking a stance during the litigation.").

Contrary to petitioner's contention (Pet. 37), the district court's reliance on the government's "string of successes" in this case is fully consistent with *Jean*. The district court did not decline to grant EAJA fees for particular phases of the case based on a determination that the government's position as to those phases was substantially justified. Rather, as required by *Jean*, the district court made a single substantial-justification determination that covered the case as whole. Nothing in *Jean* precluded the court, in making that determination, from considering the favorable rulings the government had received at various stages of the case. Indeed, especially in a long-running suit like this one, it is difficult to see how a court could cogently determine whether the government was substantially justified in the case as a whole without considering the reasonableness of the government's conduct in particular aspects of the litigation.

c. The district court also correctly determined that DoD's position had a reasonable basis in fact. Pet. App. 18-21. The court noted that the court of appeals "ha[d] held that there is at least some basis in fact for Congress's concern that there is discrimination in government contracting." *Id.* at 18. Although the court of appeals ultimately concluded that the evidence before Congress was insufficient to justify Section 1207's use of race-based criteria, the court specifically noted the validity of the types of studies Congress had considered. *Id.* at 74-75; see *id.* at 19-20. Nothing in the court of appeals' merits decision suggests that the government acted unreasonably by relying on those studies in its defense of Section 1207 against petitioner's constitutional challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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